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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1185

MEYER ZAUSNER SALES, INC., PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Secretary of Agriculture, pursuant to Section 8a(7) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 608a(7), instituted an investigation to determine whether certain federal milk marketing orders had been or were being violated by means of unlawful rebates, refunds, kickbacks, etc., resulting in nonpayment to dairy producers of the minimum prices required by the orders (Pet. App. 24a). On August 26, 1965, the Secretary issued a subpoena *duces tecum* under Section 10(h) of the Act, 7 U.S.C. 610(h), to Brown Brothers Harriman and Company (a private banking corporation in New York City), seeking the production of the bank's

records pertaining to an account maintained by petitioner (Pet. 2; Pet. App. 30a–31a), one of several "brokerage" corporations owned by Sol Zausner (Pet. 2; Pet. App. 25a). According to information obtained during the investigation, a number of dairy companies ("handlers") subject to milk marketing orders had been purchasing milk from cooperative associations of dairy producers through one or more of the Zausner corporations, and the cooperatives had been depositing substantial sums of money, in excess of normal brokerage commissions, in petitioner's bank account (Pet. App. 24a–25a). The subpoena was issued to enable the Secretary to determine what disposition petitioner had made of these deposits—specifically, whether, in the guise of brokerage commissions paid to petitioner by the cooperatives, the handlers were actually receiving unlawful rebates from the cooperatives (Pet. App. 25a).

Upon the refusal of the bank to comply with the subpoena, this action for enforcement was brought. In the district court, the bank contended, among other things, that the Secretary was authorized to subpoena the records only of persons or corporations subject to direct regulation under the Agricultural Marketing Agreement Act—which the bank, of course, is not. The district court rejected this contention and ordered compliance with the subpoena. The court of appeals affirmed, expressing its agreement with the reasoning of the district court in this case and the district court in *Freeman* v. *Fidelity-Philadelphia Trust Co.*, 248 F. Supp. 487 (E.D. Pa.), appeal pending, C.A. 3, No.

15,822.[1] Following the decision of the court of appeals, the bank indicated that it did not intend to resist the enforcement of the subpoena further. Petitioner then sought and was granted by the court of appeals leave to intervene.

Petitioner questions neither the Secretary's authority to conduct an investigation to determine whether federal milk marketing orders have been violated by means of rebates, nor the relevance of the records sought from Brown Brothers Harriman to the present such investigation—for obviously the disposition made by petitioner of the sums deposited in its account by the cooperatives bears on whether that account is serving as a conduit for the payment of rebates by the cooperatives' members to the handlers. The only question is thus whether the Secretary may subpoena the bank records of a corporation (or person) which, like Brown Brothers Harriman, is not itself directly subject to regulation under the Agricultural Marketing Act. We submit he clearly may.

7 U.S.C. 610(h) provides:

> For the efficient administration of the provisions of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of Title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter, and to any person subject to the provisions of this chapter, whether or not a corporation. * * *

[1] In *Fidelity-Philadelphia*—where the district court considered and rejected the precise contention made by petitioner in this case—the Court of Appeals for the Third Circuit on April 14, 1966, denied Fidelity-Philadelphia's motion for a stay pending appeal from the district court's enforcement order.

In other words, the Secretary of Agriculture has the same subpoena powers enjoyed by the Federal Trade Commission under 15 U.S.C. 49;[2] and it is well-settled—as petitioner apparently concedes (Pet. 9–10)—that the Trade Commission may by subpoena reach records in the possession of persons not themselves subject to its regulatory authority. See, *e.g.*, *Federal Trade Commission* v. *Tuttle*, 244 F. 2d 605 (C.A. 2), certiorari denied, 354 U.S. 925; *Federal Trade Commission* v. *Bowman*, 248 F. 2d 456 (C.A. 7). The broad investigatory powers that Congress meant to vest in the Commission—and in the Secretary—would be largely ineffective otherwise.[3] In addition, as the

[2] The legislative history of 7 U.S.C. 610(h) confirms that Congress intended to incorporate the Federal Trade Commission's subpoena power into that section without limitation. The Conference Report on Section 10 of the Agricultural Adjustment Act of 1933, 48 Stat. 37, where the provision in question first appeared, pointed out that it

> * * * makes applicable in the administration of this title the provisions of sections 8, 9, and 10 of the Federal Trade Commission Act. These sections provide for the furnishing of records, papers, and information by the departments and bureaus of the Government, *for requiring the attendance and testimony of witnesses and the production of documentary evidence*, and for the taking of depositions. * * * [Emphasis added.]

H. Rep. No. 100, 73d Cong., 1st Sess., p. 11. See, also, 77 Cong. Rec. 1486–1487. In 1935, in a report on certain proposed amendments to the 1933 Act, the House Agriculture Committee stated (H. Rep. No. 808, 74th Cong., 1st Sess., p. 7):

> By the force of Section 10(h) the Secretary can, in connection with such investigation and hearing, *exercise the same powers subject to the same limitations* as in the case of similar proceedings before the Federal Trade Commission. * * * [Emphasis added.]

[3] Petitioner argues that the Secretary does not need the Federal Trade Commission's "extensive" subpoena powers (Pet. 9).

district court pointed out (Pet. App. 13a–14a), the grant of subpoena power in 7 U.S.C. 610(h) would be wholly superfluous if its application were limited to persons or corporations subject to direct regulation, since 7 U.S.C. 608d(1) gives the Secretary all necessary authority to examine the books and records of such persons.[4]

Petitioner relies on the language of 7 U.S.C. 610(h) making the subpoena powers of the Trade Commission applicable "to any person subject to the provisions of this chapter, whether or not a corporation." (See p. 3, *supra*.) But it is obvious from the context and background that this phase was intended, not to place limitations upon the Secretary's subpoena power not applicable to the Federal Trade Commission, but merely to make clear that the Secretary's jurisdiction, powers, and duties extend to persons as well as corporations in those instances where 15 U.S.C. 48–50 con-

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On the contrary, this very investigation clearly shows the administrative need for such subpoena powers. Examining the bank account records will put the Secretary in a far better position to determine without excessive delay the true nature of the sums paid into and withdrawn from petitioner's account than if he were required to inspect the financial records of the handlers and cooperatives potentially involved here.

[4] Petitioner contends that Section 610(h) enables the Secretary to enforce Section 608d(1) by subpoena (Pet. 10). But that would be a cumbersome procedure, requiring the Secretary to institute a formal investigation pursuant to 7 U.S.C. 608a(7), whereas under 15 U.S.C. 49 (incorporated into Section 610(h); see pp. 3–4, *supra*), the Secretary may enforce Section 608d(1) far more expeditiously by mandamus proceedings in federal district courts.

fer authority upon the Federal Trade Commission only with respect to corporations.[5]

The decision below is clearly correct, and further review is not warranted. The petition for certiorari should therefore be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1966.

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[5] 15 U.S.C. 48 requires government agencies, upon Presidential direction, to furnish the Commission upon its request with all records, papers, and information in their possession pertaining to any *corporation* subject to the Federal Trade Commission Act. 15 U.S.C. 49 provides that for purposes of that Act the Commission is given access to for the purpose of examination, and the right to copy, any documentary evidence of any *corporation* being investigated or proceeded against. And 15 U.S.C. 50 penalizes any person who falsifies the records of a *corporation* subject to the Federal Trade Commission Act, and fines *corporations* that wrongfully fail to file required reports.

U.S. GOVERNMENT PRINTING OFFICE: 1966